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No. 93-432

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JOSE ANTONIO MORALES, *et al.*,
Petitioners,
v.
BARGE-WAGENER CONSTRUCTION CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari from the Supreme Court of Georgia

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF UNITED STATES OF MEXICO, LEAGUE OF UNITED LATIN AMERICAN CITIZENS AND MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND IN SUPPORT OF PETITIONERS

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---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The above amici move pursuant to Rule 37.2 of the Rules of this Court for leave to file the attached brief amicus curiae in support of the petition for Writ of Certiorari. Petitioners have consented to the filing of this brief (consent letter has been filed with the clerk of this Court), but Respondents have withheld their consent. Amici recognize that the Court's Rules disfavor unconsented amici briefs, but because the matter raised by the Petitioners' Writ of Certiorari petition affects primarily Mexican legal immigrants to the United States, amici are compelled to file. The amici joining in this motion represent the Mexican population who legally immigrate to the United States and are directly affected by similar workers' compensation statutes.

Wherefore, the United States of Mexico, the League of United Latin American Citizens, and the Mexican American Legal Defense and Educational Fund request that this Court grant leave to file the accompanying amicus curiae brief in support of the granting of Petitioners' Writ of Certiorari.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Can Georgia, within the confines of the Equal Protection Clause of the Fourteenth Amendment, discriminate against nonresident aliens/dependents in the dispensation of death benefits under its workers' compensation statute.

2. Does the equal protection clause forbid Georgia from paying Canadian citizens or residents/dependents substantially more death benefits than all other nonresident aliens/dependents under its Workers' Compensation Act.

3. Does Georgia's Workers' Compensation Act, by favoring Canadian residents or citizens with death benefits that far exceed the death benefits received by residents or citizens from other countries, create an impermissible and unconstitutional intrusion by Georgia into the field of foreign relations.

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BRIEF AMICUS CURIAE OF UNITED STATES OF MEXICO, LEAGUE OF UNITED LATIN AMERICAN CITIZENS AND MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

OPINION BELOW

The opinion of the Supreme Court of Georgia on the merits and reversing the trial court has been reported at 263 Ga. 190, 429 S.E.2d 671 (1993).

JURISDICTION

The judgment of the Supreme Court of Georgia was enacted on May 24, 1993, and a petition for reconsideration was denied on June 18, 1993.

While the opinion of the court below makes reference to the Georgia Constitution, it does not provide adequate and independent state grounds for its decision. *Michigan v. Long*, 463 U.S. 1032, 1040-41, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983). Therefore, the jurisdiction of this Court is invoked by 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1:

> ". . . nor shall any state . . . deny any person within its jurisdiction the equal protection of the laws."

U.S. Const. art. I, § 10, cl. 1:

> "No State shall enter any Treaty, Alliance, or Confederation . . ."

U.S. Const. art. I, § 10, cl. 3:

> "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with a foreign Power . . ."

Ga. Code Ann. § 34-9-265(b)(5) (Michie 1993):

> (b) If death results instantly from an accident arising out of and in the course of employment . . . the compensation under this chapter shall be as follows:
>
> . . .
>
> (5) If the employee leaves dependents who are *not citizens or residents of the United States or the Dominion of Canada* at the time of the accident, the amount of compensation shall not in any case exceed $1,000.00.

INTEREST OF AMICUS CURIAE

The United States of Mexico, is a federal republic, located immediately South of the United States. The interest of the United States of Mexico is based on the fact that a continuous flow of people from one side of our common border to the other has existed since before Columbus. In recent years, immigration North from Mexico has increased substantially, drawn by guest worker

programs and other job opportunities. Many of these workers leave their families in Mexico while they work in the United States. Consequently, Mexican citizens constitute a significant number of the individuals that are severely impacted by the laws similar to the Georgia Workers' Compensation Act.

The League of the United Latin American Citizens ("LULAC") is a national membership organization originally chartered in 1929. Its objectives are to protect and defend the civil rights of all Americans, and to improve the quality of life for all Americans. During the course of its sixty-four (64) year history, LULAC has often appeared as plaintiff or amicus in litigation before this Court and in many other federal and state courts to vindicate the rights of minorities, particularly Hispanics, who are denied the full enjoyment of their constitutional rights.

Many LULAC members who reside and work in the United States are not citizens of the United States or Canada. Some of them have dependent families who do not reside in the United States or Canada, and consequently would be victims of discrimination from state laws similar to Georgia Workers' Compensation Act.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national non-profit civil rights organization established in 1967. Its principal objective is to secure the civil rights of Latinos in the United States through litigation and education. It has frequently represented plaintiffs in civil rights and equal protection matters and appeared as *amicus curiae* before this Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS AN IMPORTANT EQUAL PROTECTION QUESTION UNDER THE FOURTEENTH AMENDMENT CONCERNING THE CONSTITUTIONALITY OF STATE DISCRIMINATION AGAINST NONRESIDENT ALIENS

Jose Morales, age thirty-one, was a resident alien from Mexico who was employed as a construction worker by Barge-Wagener Construction Company in Georgia when he fell twenty-two stories to his death from a building on which he was working. He is survived by his wife and two minor children, all of whom are citizens and residents of Mexico. His wife and children were awarded the maximum lump sum of $1,000.00, pursuant to Ga. Code Ann. § 34-9-265(b)(5) (Michie 1993), instead of being eligible for death benefits at least ten times this amount.[1] If, however, Ms. Moraies and her children had resided in Canada instead of Mexico, she would have been entitled to full benefits. Interestingly, had Ms. Morales and her children been Canadian citizens residing in Mexico at the same address, she would have been entitled to full benefits. Ironically, if Ms. Morales had been living in the United States illegally, she would have been entitled to full benefits.[2]

The substantial nature of the issues raised by Ms. Morales in this appeal is evident by the sharp disagreement amongst the members of the Georgia Supreme Court. The majority held that the death benefits provided pursuant to Ga. Code Ann. § 34-9-265(b)(5) (Michie 1993) created a right solely in the dependents. Moreover, even though the Georgia statute was acknowledged to be discriminatory because the benefits were substan-

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[1] Ga. Code Ann. §§ 34-9-261, 34-9-265(b)(3) and (5), 34-9-265(d) (Michie 1993) also allows United States citizens to receive the $100,000.00 death benefit, but that is not the subject of comparison.

[2] Dependents of legally immigrated residents from Mexico currently must wait a minimum of three years before becoming eligible for legal residency in the United States. Bureau of Consular Affairs, U.S. Dept. of State, No. 28, Visa Bulletin (1993).

tially less, the Court ruled that these nonresident aliens/dependents are not protected by the Fourteenth Amendment because they were not within the reach of the Constitution. Two other justices, in a vigorous and persuasive dissent, found that the majority's "artful" opinion—that the death benefits created a right solely in the dependents—was without foundation. *Barge-Wagener Constr. Co. v. Morales*, 263 Ga. 190, 429 S.E.2d 671, 674 (1993) (Benham, J., dissenting).[3]

The court below realized that, if the dependents were able to raise the resident alien's constitutional rights, it would not only have to confront the Fourteenth Amendment's Equal Protection Clause, but also the statute would be subject to a higher level of scrutiny. Therefore, by shifting its constitutional analysis away from the deceased resident alien, to his wife and children, all of whom were nonresident aliens, the Georgia Supreme Court avoided the equal protection analysis and the heavy burden it carries in justifying discrimination between similarly situated persons.

The urgency of this issue has grown in importance since the last time the Court was presented with a somewhat similar issue in *Jalifi v. Industrial Comm'n of Ariz.*, 132 Ariz. 233, 644 P.2d 1319, *cert. dismissed*, 459 U.S. 899, 74 L. Ed. 2d 161, 103 S. Ct. 200 (1982). After *Jalifi*, several states have addressed the issue without reaching a consensus and no predominate judicial viewpoint has emerged or appears to be emerging. *See Jurado v. Popejoy Constr. Co.*, 253 Kan. 116, 853 P.2d 669 (1993) (applying equal protection); *De Ayala v. Florida Farm Bureau Casualty Ins. Co.*, 543 So. 2d 204 (Fla. 1989) (applying equal protection); *Alvarez Martinez v. Industrial Comm'n of Utah*, 720 P.2d 416 (Utah 1986) (refusing to apply equal protection); *Peña v. Industrial Comm'n*, 140 Ariz. 510, 683 P.2d 309 (1984) (refusing to apply equal protection); *Pedrazza v. Sid Fleming Contractor, Inc.*, 94 N.M.

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[3] The dissent concluded that the majority's analogy to the Wrongful Death statute was fatally flawed. *Barge-Wagener Constr. Co. v. Morales*, 263 Ga. 190, 429 S.E.2d at 675 (1993).

59, 607 P.2d 597 (1980) (refusing to apply equal protection). Indeed, the Georgia Supreme Court has added to the confusion by failing to provide the proper framework for analyzing the equal protection clause. And, there is no indication that this issue will be resolved in the foreseeable future in the absence of a decision by this Court. To nonresident aliens, particularly with the possible emergence of the *North American Free Trade Agreement ("NAFTA")*, this question presents perhaps the most important issue in the evolution of equal protection jurisprudence. U.S. Printing Office, *North American Free Trade Agreement* (1993).

Because the Georgia Supreme Court determined that the death benefits accrued exclusively to the benefit of the survivors, one is forced to focus on the rights of the nonresident alien dependent.[4] When this Court was confronted with the same type of dependent discrimination in the context of gender issues, this Court's analytical framework was from the perspective of the employee, not the dependent. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 64 L. Ed. 2d 107, 100 S. Ct. 1540 (1980); *Weinberger v. Weisenfeld*, 420 U.S. 636, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975). The Petitioners more than adequately address this point in their brief. Amici would like, however, to direct this Court's attention to the premise underlying the Georgia Supreme Court decision—that nonresident aliens are "persons" without constitutional rights that a state is "bound to respect". *Dred Scott v Sanford*, 60 U.S. (19 How.) 393, 407, 15 L. Ed. 691 (1856).

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[4] *See Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 64 L. Ed. 2d 107, 100 S. Ct. 1540 (1980) (discussing gender discrimination in workers' compensation statute); *Califano v. Goldfarb*, 430 U.S. 199, 51 L. Ed. 2d 270, 97 S. Ct. 1021 (1977) (discussing gender discrimination in Federal Old-Age, Survivors, and Disability Insurance Program); *Weinberger v. Weisenfeld*, 420 U.S. 636, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975) (examining gender discrimination in Social Security Act); *Madera v. Insurance Accident Comm'n*, 262 U.S. 499, 67 L. Ed. 1091, 43 S. Ct. 604 (1923) (exploring discrimination against employer by workers' compensation statute).

II. THE DECISION BELOW MISCONSTRUES THE REACH OF THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE AS IT RELATES TO DISTINCTIONS MADE WITHIN A CLASS OF NONRESIDENT ALIENS ON THE BASIS OF ALIENAGE AND NATIONAL ORIGIN

This case presents an issue of exceptional importance that should be decided by this Court, since it has never considered the full extent of how the Fourteenth Amendment's Equal Protection Clause applies to nonresident aliens. Indeed, because this Court has not established the parameters by which the equal protection clause applies to nonresident aliens, the Georgia Supreme Court was able to "artful[ly]" exploit this constitutional vacuum. At the heart of the decision in the court below is that nonresident aliens, regardless of the circumstances, do not possess constitutionally protected rights.[5] This Court has, however, held that nonresident aliens do, under certain circumstances, have a constitutionally protected status under the United States Constitution that must be respected by states. *See, e.g., Russian Volunteer Fleet v. United States*, 282 U.S. 481, 75 L. Ed. 473, 51 S. Ct. 229 (1931). Some lower federal courts have said that nonresident aliens, under certain circumstances, do possess constitutional protected rights under the Fourteenth Amendment's Equal Protection Clause. *See, e.g., Alegria v. United States*, 945 F.2d 1523 (11th Cir. 1991); *Lindholm v. United States*, 808 F. Supp. 7 (D.D.C. 1992); *Stebco, Inc. v. United States*, 733 F. Supp. 1387 (S.D. Cal.), *appeal dismissed*, 939 F.2d 686 (9th Cir. 1990); *Garzon*

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[5] The issue raised by the Georgia Supreme Court brings into focus two questions that are basic to the tenets of constitutional law: (i) the domain of American constitutionalism and (ii) the concept of constitutional equality. *See* Gerald L. Neuman, *Whose Constitution?*, 100 Yale L.J. 909 (1991). Professor Neuman stresses the realization that, as our country has developed, the preferred application of the Constitution has evolved from a strict social contract approach, applying constitutional protections only to United States citizens, into an expanding municipal law approach which extends the Constitution to those who are affected by the laws of the United States. *Id.*

v. United States, 605 F. Supp. 738 (S.D. Fla. 1985). And, the Wisconsin and Texas Supreme Courts have found that, under certain circumstances, nonresident aliens do possess rights under the Fourteenth Amendment's Equal Protection Clause. *See, e.g., Alexander Ranch, Inc. v. Central Appraisal Dist. of Erath County*, 733 S.W.2d 303 (Tex. 1987), *cert. denied*, 486 U.S. 1026, 100 L. Ed. 2d 236, 108 S. Ct. 2005 (1988); *Lehndorff Geneva, Inc. v. Warren*, 74 Wis. 2d 369, 246 N.W.2d 815 (1976). The Georgia Supreme Court's decision simply cannot be reconciled with the decisions above.

When Georgia created a distinction between Canadians and other nonresident aliens within its Workers' Compensation Act, it challenged one of the most "common idea[s] of equality that [span] the political philosophy of [both] East and West." Paul Savoy, *The Spiritual Nature of Equality: Natural Principles of Constitutional Law*, 28 How. L.J. 809, 836-37 (1985).[6] As Professors Tussman & tenBroek stated:

> The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be treated similarly.

Joseph Tussman & Jacobs tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949). This is the concept of "equality" that was understood by the drafters of the Fourteenth Amendment.[7] And indeed,

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[6] See also Aristotle, *Ethica Nicomachea* V.3.1131-1131b (W. Ross trans. 1925) ("Equality in morals means this: things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness."); Aristotle, *Metaphysicai* 5.1055b-1056b (W. Ross trans. 2d ed. 1928); W. Hardie, *Aristotle's Ethical Theory* 189 (2d ed. 1980); H. Kelsen, *Aristotle's Doctrine of Justice in What Is Justice?* 110, 127-28 (1957); K. Marc-Wogau, *Aristotle's Theory of Corrective Justice and Reciprocity in Philosophical Essays* 21 (1967); Sri Aurobbindo, *The Human Cycle* 197 (A. Ghose trans. 1971).

[7] Cong. Globe, 39th Cong., 1st Sess. 342-43 (1866).

members of this Court, whose views are otherwise as diverse as former Justice Brennan,[8] and Justices Blackmum [9] and Rehnquist,[10] agree that those who are similarly situated should be treated similarly. Since 1885, this Court has established this standard as a part of equal protection jurisprudence. *See Barbier v. Connolly*, 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357 (1884); *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 556 (S.D. Tex. 1980), *aff'd sub nom. Plyler v. Doe*, 457 U.S. 202, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982). The question presented by both the Georgia Supreme Court's decision and Georgia's workers' compensation classification is simply whether a state government can legitimately discriminate between similarly situated individuals on the basis of alienage and national origin.[11]

This case does not compare United States citizens to nonresident aliens, United States citizens to resident aliens, nor resident aliens to nonresident aliens in the United States. Moreover, Amici do not attempt to convince the Court that nonresident aliens have the full complement of constitutional rights possessed by either resident aliens or United States citizens.[12]

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[8] *Plyler v. Doe*, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982) (per Brennan, J.) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 64 L. Ed. 989, 40 S. Ct. 560 (1920)); *Frontiero v. Richardson*, 411 U.S. 677, 683, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973) (per Brennan, J.).

[9] *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978) (concurring and dissenting opinion).

[10] *Rostker v. Goldberg*, 453 U.S. 57, 64, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981) (per Rehnquist, J.).

[11] The Georgia statute discriminates both on the basis of alienage and national origin. The statute draws its initial distinction between nonresident aliens on one hand and resident aliens and United States citizens on the other. The statute then further distinguishes on the grounds of national origin to favor Canadian nonresident aliens over those of every other nationality.

[12] The equal protection questions presented to the Court to date deal primarily with the issue of resident aliens. *Cabell v. Chavez-Salido*, 454 U.S. 432, 70 L. Ed. 2d 677, 102 S. Ct. 735 (1982); *Hamp-*

Here Georgia, by granting benefits to nonresident aliens, discriminates against a sub-class of these aliens on the basis of national origin by treating those residing in Canada and Canadian citizens more favorably than all others. When a state grants benefits, however, it cannot constitutionally distribute those benefits in an impermissible discriminatory manner.[13] Indeed, here the Georgia Supreme Court admits that the workers' compensation statute is discriminatory.

Georgia's statute works an invidious distinction, the nature and intent of which is best illustrated by the historical context in which the law was enacted. Georgia's Workers' Compensation Act, including its alien-dependent exclusion provision, was adopted in 1920 during the movement for the institution of compulsory industrial accident insurance that swept the country from 1909 to 1920. 1920 Ga. Laws 814; Arthur Larson, *The Law of Workmen's Compensation* §§ 5.20, 5.30 (1952 & Supp. 1993). Indeed, one of the most prominent features of our national lore is the great influx of immigrants between the 1880s and the early 1920s. Less celebrated is the nativist, anti-immigrant backlash that accompanied this phenomenon and eventually succeeded in radically altering our national immigration policy.[14]

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ton v. Mow Sun Wong, 426 U.S. 88, 48 L. Ed. 2d 495, 96 S. Ct. 1895 (1976); *Sugarman v. Dougall*, 413 U.S. 634, 37 L. Ed. 2d 853, 93 S. Ct. 2842 (1973); *Graham v. Richardson*, 403 U.S. 365, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 92 L. Ed. 1478, 68 S. Ct. 1138 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 (1886).

[13] *Hooper v. Bemalillo County Assessor*, 472 U.S. 612, 86 L. Ed. 2d 487, 105 S. Ct. 2862 (1985) (exploring tax exemption for Vietnam veterans residing in the state before a certain date); *Zobel v. Williams*, 457 U.S. 55, 72 L. Ed. 2d 672, 102 S. Ct. 2309 (1982) (discussing Alaskan residents' distribution plan); *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049 (5th Cir. 1984) (reviewing state's expenditures of tax dollars).

[14] While the Chinese Exclusion Act of 1882 was the first significant inhibition of free immigration to the United States, the cam-

This nativist movement was animated by three fundamental principles: the racial superiority of Anglo-Saxons; bias against Roman Catholics; and hostility to foreign "radicals." John Higham, *Strangers in the Land* 158-334 (1967). Each of these prejudices disfavored immigrants from largely Catholic Mexico, especially when it is observed that this period also witnessed the Mexican Revolution from 1909 to 1920, the consequent increase in immigration from Mexico, and Mexico's association in the mind of the United States with Germany and the Central Powers during World War I. Roger Daniels, *Coming to America* 307, 333 (1990); Paul Enrlich, *The Golden Door* 129-135 (1979); Ricardo Romo, *East Los Angeles: History of a Barrio* 91-110 (1983). This anti-immigrant movement, while national in its reach, found particular fervor in the Southern and Western states, and it is perhaps not surprising in view of the statute at issue here, that the Ku Klux Klan was reborn in Georgia in 1915 and flourished in 1920 with Klan leaders pointing to foreign immigrants as one of the chief evils to be opposed. Higham, *Strangers* at 286-99.

When viewed in the context in which it was adopted, the statute is a vestige of the nativist sentiment infecting public policy at the time of its adoption. This Court has repeatedly confronted and consistently invalidated such state laws, and should not tolerate Georgia's Workers' Compensation law at all. *E.g., Yick Wo v. Hopkins*, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 (1886); *Truax v. Raich*, 239 U.S. 33, 60 L. Ed. 131, 36 S. Ct. 7 (1915); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 92 L. Ed. 1478, 68 S. Ct. 1138 (1948); *Graham v. Richardson*, 403 U.S. 365, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971).

In the opinion of the Georgia Supreme Court, nonresident aliens do not possess Fourteenth Amendment rights

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paign to restrict immigration reached its zenith and was perhaps the principal political crusade during the first two decades of the 1900s. *See* Roger Daniels, *Coming to America* 246, 365-384 (1990); John Higham, *Strangers in the Land* 158-384 (1967).

because they are not "within its jurisdiction," and cannot be considered a part of the community of individuals that are entitled to constitutional protection. *Barge-Wagener Const. Co. v. Morales*, 263 Ga. 190, 429 S.E.2d at 673. This conclusion, which is devoid of any analytical framework, is based upon a fundamental misconception as to the proper criteria for determining the application of the equal protection clause particularly to nonresident aliens. *But see United States v. Verdugo-Urquidez*, 494 U.S. 259, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950) (analyzing application of Constitution to nonresident aliens when acts occurred outside of United States).

The Georgia Supreme Court's holding that nonresident aliens do not possess Fourteenth Amendment rights limits the phrase "within its jurisdiction" to include only those nonresident aliens that are within Georgia's physical territory.[15] The court below failed to consider this Court's interpretation in *Plyler v. Doe*, 457 U.S. 202, 214, 72 L. Ed. 786, 102 S. Ct. 2382 (1982), that the equal protection clause applies "to all within a State's boundaries, and to all upon whom the State would impose the obligations of its laws."[16] By making workers' compensation the ex-

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[15] The legislative history of the equal protection clause provides almost no assistance determining the extent and meaning of this phrase. The drafting committee, as a result of deliberating in secret, never cited the purposes of the statement. The floor debates concentrated on the terms for readmission of the southern states and spent little time discussing the equal protection clause. For the most part the discussions focused almost entirely on race. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 342-43 (1866) (remarks of Sen. Howard); *see also* Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Colum. L. Rev. 131 (1950); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding?*, 2 Stan. L. Rev. 5 (1949).

[16] An additional analysis applicable to this case is to look at the connections between the nonresident alien and the United States or a smaller community therein. *See* Symposium, *Due Process and Membership in National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165 (1983) (recognizing that equal protection

clusive remedy in a work-related death and limiting any recovery to $1,000.00, Georgia has under the color of authority punitively affected the rights of all nonresident aliens except for Canadian citizens or residents, thereby bringing them within Georgia's jurisdiction.

The Georgia Supreme Court's minimalist interpretation also flies in the face of evolving equal protection jurisprudence. *Alegria v. United States*, 945 F.2d 1523 (11th Cir. 1991); *Lindholm v. United States*, 808 F. Supp. 7 (D.D.C. 1992); *Stebco, Inc. v. United States*, 733 F. Supp. 1387 (S.D. Cal.), *appeal dismissed*, 939 F.2d 686 (9th Cir. 1990); *Garzon v. United States*, 605 F. Supp. 738 (S.D. Fla. 1985).[17] As earlier stated, even the state Supreme Court in both Wisconsin and Texas have read the United States constitution to extend equal protection to nonresident aliens. *See, e.g., Alexander Ranch, Inc. v. Central Appraisal Dist. of Erath County*, 733 S.W.2d 303 (Tex. 1987), *cert. denied*, 486 U.S. 1026, 100 L. Ed. 2d 236, 108 S. Ct. 2005 (1988); *Lehndorff Geneva, Inc. v. Warren*, 74 Wis. 2d 369, 246 N.W.2d 815 (1976). Indeed, this Court on one occasion found it appropriate to resolve the dispute over discriminatory taxation statutes in favor of a nonresident alien, although the Court did not discuss the nonresident status of the taxpayer. *Hillsborough Township v. Cromwell*, 326 U.S. 620, 90 L. Ed. 358, 66 S. Ct. 445 (1946).

In addition to discriminating on the grounds of alienage, the Georgia statute created a distinction based upon

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rights are often determined by community ties experienced between alien and United States); Symposium, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. Pitt. L. Rev. 237 (1983) (exploring and challenging Martin's ideas).

[17] In each of these cases, the lower federal court has recognized that the denial of an appropriate forum to challenge a tax jeopardy assessment would constitute an infringement of the "due process" and "equal protection rights" of nonresident aliens. *Alegria v. United States*, 945 F.2d at 1527-28 (11th Cir. 1991); *Lindholm v. United States*, 808 F. Supp. at 9 (D.D.C. 1992); *Stebco, Inc. v. United States*, 733 F. Supp. at 1390 (S.D. Cal. 1990); *Garzon v. United States*, 605 F. Supp. at 745 (S.D. Fla. 1985).

national origin.[18] Ga. Code Ann. § 34-9-265(b)(5) (Michie 1993). National origin as well as alienage is a suspect classification and therefore enjoy the "heightened judicial solicitude" of a suspect class. *Graham v. Richardson*, 403 U.S. 365, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971); *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980). Justice Rehnquist recognized in a dissenting opinion that a "state statute that classifies aliens on the basis of country of origin is much more likely to classify on the basis of race, and thus conflict with the core purpose of the Equal Protection Clause, than a statute that . . . merely distinguishes between alienage as such and citizenship as such." *Sugarman v. Dougall*, 413 U.S. 634, 655, 37 L. Ed. 2d 853, 93 S. Ct. 2842 (1973) (dissenting opinion). This Court has firmly established that alienage and national origin are suspect classification.

In *Plyler v. Doe*, 457 U.S. 202, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982), this Court further held that illegal alien children do not constitute a suspect class nor warrant strict scrutiny. In considering the applicability of these decisions to nonresident aliens, two points emerge. The first is that these cases deal only with resident aliens, and second, the question of whether nonresident aliens constitute a suspect class has not been decided by this Court. In *Lehndorff Geneva, Inc. v. Warren*, 74 Wis. 2d 369, 246 N.W.2d 815 (1976), and *Alexander Ranch Inc. v. Central Appraisal Dist. of Erath County*, 733 S.W.2d 303 (Tex. 1987), *cert. denied*, 486 U.S. 1026, 100 L. Ed. 2d 236, 108 S. Ct 2005 (1988), both state Supreme Courts applied the rational basis standard to nonresident aliens. In *Sailer v. Tonkin*, 356 F. Supp. 72 (V.I. 1973), however, the federal court did use strict

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[18] Discrimination on the basis of national origin was scrutinized by the Court in *Korematsu v. United States*, 323 U.S. 214, 89 L. Ed. 194, 65 S. Ct. 193 (1944), where the Court examined statutory distinctions based upon a person's ancestry and descent. As an example of national origin, in *Korematsu*, the petitioner was an American citizen of Japanese descent.

scrutiny to invalidate a nonresident alien classification.[19] Whatever level of scrutiny this Court decides to apply, the Georgia Workers' Compensation Act cannot withstand that judicial scrutiny.

III. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION CONCERNING THE CONSTITUTIONALITY OF A STATE'S WORKERS' COMPENSATION ACT WHICH, BY MAKING DISTINCTIONS BASED UPON ALIENAGE AND NATIONAL ORIGIN, INSERTS THAT STATE INTO THE SPHERE OF FOREIGN AFFAIRS THAT IS EXCLUSIVE TO THE FEDERAL GOVERNMENT

This Court, for over a considerable number of years, has not confronted the exclusivity of the federal government's power in the field of foreign affairs. *See Zschernig v. Miller*, 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968); *Clark v. Allen*, 331 U.S. 503, 91 L. Ed. 1633, 67 S. Ct. 1431 (1947). In Georgia, this void has permitted a statute that has a persistent and subtle effect on foreign relations. Out of all the countries of the world, Georgia has decided that only Canadian citizens or other residents of Canada are deserving of equal treatment with United States citizens or residents. Whether Ms. Morales and her children lived in Great Britain, Japan, Germany, or in any of the Latin American countries, it would make no difference. On the other hand, had Ms. Morales resided in Canada, she would receive the same benefits as a United States citizen would under the statute. Allowing the Georgia Workers' Compensation Act to stand would establish a dangerous precedent in that nothing would prevent each state in the Union from selecting a different nation to receive such special treatment.[20]

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[19] The federal district court did not, however, analyze the distinctions between resident and nonresident aliens. Essentially the court held that the portion of the Virgin Islands Criminal Compensation Act which denied compensation to a nonresident alien visitor to the territory did not meet the compelling state interest necessary for a suspect class.

[20] For example, if the statute is allowed to stand, perhaps states in the Southwest will prefer to extend this special status to Mexico. Perhaps states in the Northwest will prefer to confer this special

The United States Constitution reserves the field of foreign affairs exclusively for the federal government. *Hines v. Davidowitz*, 312 U.S. 52, 63, 85 L. Ed. 581, 61 S. Ct. 399 (1941) (concluding that "our system of government is such that the interest of the cities, counties, states, no less than the interests of the people of the whole nation, imperatively requires that the federal power in the field affecting foreign relations be left entirely free from local interference"); see also *Chae Chan Ping v. United States* ("Chinese Exclusion Case"), 130 U.S. 581, 606, 32 L. Ed. 1068, 9 S. Ct. 623 (1888). This principle emanates from several provisions of the United States Constitution. Illustrative of this principle is the President's and the Senate's powers to make treaties; [21] the President's and the Congress' powers to make war; [22] and the prohibition on states to enter into a compact with foreign governments.[23] James Madison eloquently summarized with penetrating insight this concept when he said in *The Federalist* No. 42 (James Madison) that, "if we are to be one nation in any respect, it clearly ought to be in respect to other nations." In sum, individual states may not intrude into the exclusive federal sphere of foreign affairs.

This Court in *Zschernig v. Miller*, 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968), struck down an Oregon statute that prohibited nonresident aliens from receiving property through the Oregon probate courts unless certain conditions were satisfied. 389 U.S. at 430-31.[24] This Court found that such a statute had "led into

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benefit on Canada. Perhaps cities containing a large Jewish population will prefer Israel in some fashion. It is precisely this type of state preference for a particular foreign nation that the United States Constitution prohibits.

[21] U.S. Const. art. I, § 2, cl. 2.

[22] U.S. Const. art. II, § 2, cl. 1; U.S. Const. I, § 8, cl. 11; U.S. Const. art. I, § 8, cl. 12.

[23] U.S. Const. art. I, § 10, cl. 3.

[24] First, Oregon required that the country in which the beneficiary resided maintain a reciprocal right for United States citizens to receive property. Second, Oregon insisted that the foreign

minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation" on whether nonresident aliens actually received the benefits of the property or money. 389 U.S. at 435. Moreover, this Court observed that such a statute, which allows for such inquiry, could lead to inflammatory statements by state court judges regarding the Soviet block countries and therefore could affect foreign affairs. 389 U.S. at 438, n.8. Consequently, this Court concluded that the Oregon statute unconstitutionally encroached into foreign affairs because it made "unavoidable judicial criticism of nations established on a more authoritarian basis than our own" and "affect[ed] international relations in a persistent and subtle way." 389 U.S. at 440.

Some courts have interpreted *Zschernig* as only stating that "judicial criticism of foreign governments is, then, constitutionally impermissible." *Shames v. Nebraska*, 323 F. Supp. 1321, 1322 (D. Neb. 1971), *aff'd* 408 U.S. 301, 33 L. Ed. 2d 321, 92 S. Ct. 2478 (1972). *See Hines v. Davidowitz*, 312 U.S. 52, 85 L. Ed. 2d 581, 61 S. Ct. 399 (1941). The proper distinction, however, is between federal and the state legislature. *See* Kevin P. Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 Tul. L. Rev. 469 (1987).

The Georgia statute is more like the statute in *Zschernig*, and much different from the statute that was the subject of this Court's inquiry in *Clark v. Allen*, 331 U.S. 503, 91 L. Ed. 1633, 67 S. Ct. 1431 (1947). In *Clark*, this Court sustained the California statute because its effect on other countries was incidental or indirect. What offended this Court in *Zschernig*, however, was that

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country allow United States citizens to receive funds from estates in that country. Third, a foreign resident had to establish that he would receive the benefit of money or property from the estate of or persons dying in Oregon "without confiscation, in whole or in part," by his government. *Id.* at 430, n.1, *citing* Or. Rev. Stat. § 111.070 (1957).

the structure of the statute facilitated, in that instance through the judiciary, the state's insertion into the exclusive province of the federal government to conduct foreign affairs. The Georgia statute is strikingly similar but with a slight twist. The statute is not structured to allow the judiciary to make an assessment of foreign policy before passing on the quality of rights to be extended to the nonresident alien. Instead, by discriminating on the basis of national origin and alienage, Georgia has codified its criticism of all other nations and perforce has injected itself into the field of foreign affairs. As a consequence, the Georgia courts are forced to relegate all nationalities except for Canadians to second class status. This directly offends this Court's holding in *Zschernig*.

It is not the judicial nature of the criticism, but that a statute, such as the Georgia Workers' Compensation Act, facilitates criticism. Allowing a state to select the citizens or residents of a nation for preferred status no doubt is a form of criticism, expressed or not, of those country's citizens or residents who are not favored for preferred status. The exercise of such powers cannot only have a corrosive effect on the separation of powers between the state and federal government in the area of foreign affairs, but also in the United States' relationships with other foreign governments. It is difficult to imagine that the Framers intended to preclude only state judicial criticism of foreign governments by reserving the policy of foreign affairs to the federal government. *See The Federalist* No. 42 (James Madison). Foreign affairs is exclusively a domain of the federal government.

Although the Georgia statute has been in effect for over seventy years and, as a practical matter, may have had little influence on foreign policy, this Court has held that, when dealing with constitutional questions, what may happen must be considered. *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 325, 94 L. Ed. 2d 347, 107 S. Ct. 1149 (1987). Furthermore, we must remember that "[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may

arise from real or imagined wrongs to another subject's inflicted, or permitted by a government." *Hines v. Davidowitz*, 312 U.S. 52, 64, 85 L. Ed. 581, 61 S. Ct. 399 (1941). In the field of foreign affairs what is insignificant today may be significant tomorrow.

Last, the Georgia Workers' Compensation Act is at the very least a compact with a foreign government, and, therefore, violates the United States Constitution. One cannot be constrained to the literal interpretation of "compact." *See, e.g., Olmstead v. United States*, 227 U.S. 438, 72 L. Ed. 944, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting) (holding that "a principle to be vital must be capable of wider application than the mischief which gave it birth . . . in the application of Constitution, therefore, our application cannot be only what has been but of what may be").

This Court has also never had the opportunity to determine whether a state by virtue of its statutes enters into a compact, as defined under Article I, Section 10, Clause 3 of the United States Constitution, with a foreign nation. As noted above, the Georgia statute benefits the citizens of one country. Although Canada may not have bargained for this advantage, the purpose of the Compact Clause is to prevent states from differentiating among foreign governments in this manner. Georgia has, by virtue of its statute, decided to elevate Canada to a special status among nations.

Fundamental to the concept of federalism is the separation of powers between the state and federal government. Nowhere is this principle more basic to a national government than in the field of foreign affairs. As Justice Sutherland stated in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316, 81 L. Ed. 255, 57 S. Ct. 216 (1936), "[e]ven before the Declaration [of Independence], the colonies were united in foreign affairs." Even though Georgia's Workers' Compensation Act is subtle, it nonetheless is an intrusion into the federal government's exclusive domain over foreign affairs. Such a statute, which arbitrarily selects a nation for favorable treatment to the

exclusion of all others, without at a minimum consulting with the federal government is perilous. Unless reversed, the Georgia Supreme Court decision legitimizes an unlawful intrusion of the state into the ability of this nation to speak with one voice in foreign affairs.

CONCLUSION

For the foregoing reasons, Amici pray that Petitioners Writ of Certiorari to review the Judgment and Opinion of the Supreme Court of Georgia in this case be granted.

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